IN THE

# Supreme Court of the United States

October Term, 1964.

No. 294.

ONE 1958 PLYMOUTH SEDAN,
*Petitioner,*

*v.*

COMMONWEALTH OF PENNSYLVANIA,
*Respondent.*

On Writ of Certiorari to the Supreme Court of Pennsylvania.

# BRIEF FOR PETITIONER.

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## BRIEF FOR THE PETITIONER.

### OPINIONS BELOW.

The opinions of the Supreme Court of Pennsylvania (R. 29-36) are reported at 414 Pa. 540, 201 A. 2d 427. The opinions of the Superior Court of Pennsylvania (R. 20-29) are reported at 199 Pa. Superior Ct. 428, 186 A. 2d 52. The opinion of the Court of Quarter Sessions of Philadelphia County (R. 13-19) is unreported.

### JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on April 21, 1964 (R. 29). A timely petition for reargument was denied on June 30, 1964 (R. 36). The petition for a writ of certiorari was filed on July 17, 1964, and was granted on December 7, 1964 (R. 37). The jurisdiction of this Court rests on 28 U. S. C. § 1257(3).

## QUESTIONS PRESENTED.

1. May state officers, acting without a search or body warrant, stop and search an automobile solely on the ground that the automobile is riding low in the rear?

2. Are agents of a state permitted to stop and search automobiles and travelers at state borders, without a warrant and without probable cause, to ascertain whether such travelers are bringing property into the state upon which a state tax is due?

3. Is evidence which has been obtained by an unreasonable search and seizure, and thus must be excluded in a criminal case, likewise to be excluded in a proceeding by a state to forfeit an automobile allegedly used in the transportation of untaxed liquor?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The Pennsylvania Liquor Code provides in pertinent part:

**"§ 2-209. Officers and investigators of the board to be peace officers; powers**

. . . [O]fficers and investigators shall have power and authority, upon reasonable and probable cause, to search for and to seize without warrant or process, except in private homes, any liquor . . . unlawfully . . . imported or transported, and any . . . vehicles . . . which are or have been used in the unlawful . . . importation or transportation of the same. Such liquor . . . or . . . vehicles . . . so seized shall be disposed of as hereinafter provided." 1951, April 12, P. L. 90, art. II, § 209, PA. STAT. ANN. tit. 47, § 2-209.

**"§ 6-601. Forfeiture of property illegally possessed or used**

No property rights shall exist in any liquor . . . illegally manufactured or possessed, or in any . . . vehicle . . . used in the illegal manufacture or illegal transportation of liquor . . . and the same shall be deemed contraband and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board, be instituted. . . . No such property when in the custody of the law shall be seized or taken therefrom on any writ of replevin or like process." 1951, April 12, P. L. 90, art. VI, § 601, as amended, 1956, April 20, P. L. (1955) 1508, § 1, PA. STAT. ANN. tit. 47, § 6-601 (Supp.).

**"§ 6-602. Forfeiture proceedings**

* * *

(e) At the time of said hearing, if the Commonwealth shall produce evidence that the property in question was unlawfully possessed or used, the burden shall be upon the claimant to show (1) that he is the owner of said property, (2) that he lawfully acquired the same, and (3) that it was not unlawfully used or possessed.

In the event such claimant shall prove by competent evidence to the satisfaction of the court that said liquor, alcohol or malt or brewed beverage, or still, equipment, material, utensil, vehicle, boat, vessel, container, animal or aircraft was lawfully acquired, possessed and used, then the court may order the same returned or delivered to the claimant; but if it appears that said liquor, alcohol or malt or brewed beverage or still, equipment, material or utensil was unlawfully possessed or used, the court shall order the same destroyed, delivered to a hospital, or turned over to the board, as hereinafter provided, or if it appears that said vehicle, boat, vessel, container, animal or aircraft was unlawfully possessed or used, the court may, in its discretion, adjudge same forfeited and condemned as hereinafter provided." 1951, April 12, P. L. 90, art. VI, § 6-602, as amended, 1956, April 20, P. L. (1955) 1508, § 1, PA. STAT. ANN. tit. 47, § 6-602 (Supp.).

## STATEMENT OF THE CASE.

On January 23, 1961, the Commonwealth of Pennsylvania filed a petition in the Court of Quarter Sessions of Philadelphia County alleging that it had seized a 1958 Plymouth sedan automobile in the possession of George McGonigle and that the automobile had been used in violations of the Pennsylvania Liquor Code. The petition prayed that the court adjudge the automobile forfeited to the Commonwealth of Pennsylvania (R. 1-2). A hearing was held on July 18, 1961, which was directed to the circumstances under which the automobile was stopped and searched. The testimony revealed that two enforcement officers of the Pennsylvania Liquor Control Board, who had no search or body warrant (R. 6), followed the automobile across the bridge from Camden, New Jersey, to Philadelphia, Pennsylvania, and halted it a short distance within Philadelphia (R. 5). A search into the rear and trunk of the automobile turned up 375 bottles of known brand liquor which did not contain Pennsylvania tax seals (R. 5, 6). Neither officer had seen this automobile or McGonigle prior to this occasion (R. 6-8). Officer Reitman testified that his only reason for following and stopping the automobile was that it was quite low in the rear and that all he acted on was a suspicion (R. 6-7). Officer Snyder testified that his testimony was the same as Reitman's, with the addition that he had reason to believe that a late model, black, four-door sedan Plymouth was delivering liquor illegally into Pennsylvania from South Jersey (R. 8). However, the trial judge, observing that there was no testimony that the automobile in question was a four-door, black, Plymouth sedan, rejected Snyder's additional testimony as a basis for probable cause (R. 16, 19).

At the conclusion of the hearing an oral application was made to dismiss the petition on the basis that the Commonwealth's evidence was obtained as a result of an

unreasonable search and seizure prohibited by the Fourth and Fourteenth Amendments (R. 10). Specifically, it was contended that the officers of the Liquor Control Board, who had no search or body warrant, did not have probable cause to stop the automobile in which they found the liquor (R. 9-12). The trial judge made a specific finding of fact that the officers' sole basis for stopping the automobile was that it was low in the rear (R. 18-19). He concluded that the seizure was illegal and that the evidence flowing therefrom should have been excluded under *Mapp v. Ohio*, 367 U. S. 643 (R. 19). Accordingly, the Petition for Forfeiture was dismissed (R. 2-3).

The Commonwealth appealed to the Superior Court of Pennsylvania which, by a 4-3 decision, reversed the order dismissing the petition. The Superior Court made no specific determination that the officers had probable cause to stop the automobile and search therein, but rather based its decision on the following principle:

> "A state should have the right to stop a traveler coming into the state and to search his belongings to ascertain whether he is bringing into the state any property upon which a state tax is due. The Commonwealth of Pennsylvania has a sales tax, a liquor tax and a cigarette tax, and if its officers may not stop vehicles coming into the state to ascertain whether its laws are being violated, law enforcement will be greatly impeded." (R. 23)

The two dissenting opinions asserted that the Constitution of the United States does not permit travelers to be indiscriminately stopped at state borders without cause or reason (R. 25, 26-28).

Your petitioner thereupon appealed to the Supreme Court of Pennsylvania, raising the Fourth Amendment question of the reasonableness of the search and seizure and also the question of whether the Superior Court's disposition of the case denied liberty of travel without due process of law. The Supreme Court permitted the Superior

Court judgment to stand. In affirming, the Supreme Court held that it need not reach the question of the validity of the search and seizure since, in its opinion, the federal constitutional guarantees relating to unlawful searches, arrests and seizures in criminal proceedings were not applicable in a forfeiture proceeding (R. 30, 31). One Justice wrote a concurring opinion dealing with certain procedural aspects of forfeiture proceedings (R. 35) and Justice Musmanno dissented without opinion (R. 34). A timely petition for reargument was denied (R. 36).

## SUMMARY OF ARGUMENT.

The officers who stopped the automobile in question did so upon the sole ground that it was riding quite low in the rear (R. 19). This single fact would not cause a man of reasonable caution to believe that liquor not bearing Pennsylvania tax stamps was being transported in the automobile. The stopping was therefore unconstitutional under the Fourth and Fourteenth Amendments and all evidence obtained thereby is unavailable to the government in a court of law, whether in a criminal, civil or quasi-criminal proceeding. This rule of exclusion is to be applied in a forfeiture proceeding, which is quasi-criminal in nature although civil in form. If the exclusionary rule were inapplicable in a forfeiture proceeding, the government would thereby be permitted to benefit from its own wrongful conduct.

The automobile is not *per se* contraband, as distinguished from narcotics, counterfeit plates, or even illegal liquor; it is rendered contraband only if its illegal use has been legally established. It is therefore only derivatively contraband; but its allegedly illegal use cannot be proved in a court of law, since the only evidence available to prove its derivative illegality was obtained in an unconstitutional manner and is hence inadmissible in a court of law. Just as the illegally seized alcohol cannot be introduced against the driver of the automobile, likewise the alcohol cannot be introduced against the automobile itself.

The public is not hurt by this application of the exclusionary rule. The question before the Court is not whether the liquor (whose possession may be against public policy) should be returned but whether the automobile supposedly used to transport it (and whose possession is not against public policy) should be forfeited.

## ARGUMENT.

### I.

### The Officers Did Not Have Probable Cause to Stop the Automobile and Search Inside.

McGonigle's automobile was stopped and searched by two state officers armed with neither a search warrant nor a body warrant (R. 6). Consequently, the constitutional validity of the stopping depends on whether or not the officers had probable cause to so act. *Beck v. Ohio,* 379 U. S. 89, 91. The first officer to testify forthrightly stated that he had acted upon suspicion (R. 7). *Cf. Henry v. United States,* 361 U. S. 98, 104. His suspicion was based solely on the fact that the car was riding quite low in the rear (R. 7). The other officer offered the precise testimony as the first (R. 8), with the addition that by prior observation he had reason to believe that a late model, black, four-door sedan Plymouth was delivering liquor illegally into Pennsylvania. Significantly, the trial judge found for two reasons that this additional factor could not be considered in determining probable cause. First, he found no testimony that the car in question fit the description of the car previously observed by the officer (R. 16). Second, the trial judge found as a fact that this additional factor was a "factual falsity" (R. 19). He therefore concluded that the sole reason for stopping McGonigle's car was that it was low in the rear (R. 19). It must be remembered that these findings of fact of the state trial court are of the utmost significance upon review of a determination of probable cause. *Ker v. California,* 374 U. S. 23, 33; *Beck v. Ohio,* 379 U. S. 89, 100-101 (Dissenting opinion of Mr. Justice Harlan).

On the record as outlined above, did the state meet its burden of showing that at the moment of the stopping the facts and circumstances within the officers' knowledge

and of which they had reasonably trustworthy information were sufficient to warrant a man of reasonable caution in believing that the automobile contained contraband liquor? *Carroll v. United States*, 267 U. S. 132, 162. If we accept the finding of fact of the trial court that the sole reason for stopping McGonigle's car was that it was quite low in the rear, the lack of probable cause is an irresistible conclusion.[1] However, even if the additional testimony of the second officer is considered, the facts fall far short of supporting a conclusion of probable cause. Just as the officer in *Beck v. Ohio, supra*, left it a mystery as to what his informer told him about Beck, so too did the officer in the instant case fail to state what he observed about the four-door, black Plymouth and when he observed it. All the officer really imparts is his conclusion that he had reason to believe some other car was illegally transporting liquor. Without supporting and connecting facts, this protestation is valueless. A magistrate would have been remiss in issuing a warrant on such testimony. *Aguilar v. Texas*, 378 U. S. 108.

It remains to deal with the following theory of the Superior Court of Pennsylvania:

> "A state should have the right to stop a traveler coming into the state and to search his belongings to *ascertain* whether he is bringing into the state any property upon which a state tax is due. The Commonwealth of Pennsylvania has a sales tax, a liquor tax and a cigarette tax, and if its officers may not stop vehicles coming into the state to *ascertain* whether its laws are being violated, law enforcement will be greatly impeded." (R. 23) (Emphasis added.)

The simple answer lies in the words of Mr. Chief Justice Taft in *Carroll v. United States*, 267 U. S. 132, 153-154:

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1. *Cf. United States v. Valentine*, 202 F. Supp. 677 (E. D. Tenn. 1962); *Emite v. United States*, 15 F. 2d 623 (5th Cir. 1926).

"It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highway to the inconvenience and indignity of such a search . . . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."[2]

Petitioner having been stopped by Pennsylvania officers in a manner offensive to the Constitution of the United States, the tangible evidence[3] and statements[4] obtained as a result thereof would appear by that same authority to be unavailable to the state government proceeding against the petitioner in a court of law. Nevertheless, it has been held by some courts, including the court below (R. 30, 31), that in a civil forfeiture proceeding the Fourth Amendment exclusionary rule must be ignored.[5]

In the case at bar, the court below held that the constitutional rule of exclusion of illegally obtained evidence only applies to criminal cases and that forfeiture proceed-

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2. Even if the Pennsylvania Superior Court is correct in suggesting that a state should have the right to obstruct interstate travel in order to protect its revenue, it does not follow ineluctably that the remedy for discovery of taxable items should be the conviction of the transporter or the forfeiture of his automobile. The remedy for the evil sought to be corrected lies in a procedure for the collection of the taxes, not punishment of the transporter.

3. *Mapp v. Ohio*, 367 U. S. 643.

4. *Wong Sun v. United States*, 371 U. S. 471, 485-486.

5. Besides ignoring the exclusionary rule, the court below also ignored section 2-209 of the Pennsylvania Liquor Code (reproduced above under "Constitutional and Statutory Provisions Involved"), which empowers enforcement officers to make searches and seizures without a warrant, except in private homes, *"upon reasonable and probable cause."* (emphasis added).

ings are not criminal cases but rather civil proceedings *in rem* (R. 31). Thus, by the mere labeling of the form of action, without an analysis of the true nature of the case, the rule of *Mapp v. Ohio*, 367 U. S. 643, was effectively avoided in this matter.

## II.

## The Fourth Amendment Exclusionary Rule Must Be Applied in a Proceeding to Forfeit a Person's Property.

### A. *A Forfeiture Proceeding Is Penal or Quasi-Criminal in Nature.*

To say that the Fourth Amendment is without impact in a forfeiture action simply because a forfeiture action procedurally lies *in rem* is to oversimplify the issue. Moreover, such an argument ignores the landmark authority of this Court in *Boyd v. United States*, 116 U. S. 616.

It is not an insignificant coincidence that the *Boyd* case came to this Court not as a criminal case, but in the posture of an action by the United States to forfeit thirty-five cases of plate glass. Under constitutional attack was an order of the District Judge compelling the claimants of the plate glass to produce certain records which would aid the United States in proving its case. The order was entered pursuant to section 5 of the Act of June 22, 1874,[6] which provided in pertinent part as follows:

> "In all suits and proceedings *other than criminal* arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to . . . the defendant or claimant will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice or paper, and setting forth the allegation which he expects to prove; and thereupon the court . . . may, at its discretion, issue a notice to the de-

6. 18 Stat. 187, 19 U.S.C. 535.

> fendant or claimant to produce such book, invoice, or paper in court . . .; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper . . . the allegations stated in the said motion shall be taken as confessed . . .." (Emphasis added.)

This Court carefully and deliberately framed the issue in the *Boyd* case as whether the compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws, constituted an unreasonable search and seizure within the meaning of the Fourth Amendment of the Constitution.[7] *Boyd v. United States, supra* at 622. The Court recognized that it was dealing both with an act which expressly excluded criminal proceedings from its operation and with a case not technically a criminal proceeding, and that neither, therefore, was within the literal terms of the Fourth and Fifth Amendments. *Boyd, supra* at 633. Undisturbed by these apparent obstacles, the Court observed:

> "We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." *Boyd, supra* at 633-634.

Mr. Justice Bradley reasoned that forfeiture of property is actually a penalty affixed to a criminal act, and that its civil form could not disguise its criminal nature and by such device deprive a claimant of his immunities as a citizen. *Boyd, supra* at 634. He concluded as follows:

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7. At first blush, this issue appears to involve the Fifth Amendment privilege against self-incrimination rather than the Fourth Amendment prohibition against unreasonable search and seizure. However, the *Boyd* Court considered the Fourth and Fifth Amendments as "running almost into each other." *Mapp v. Ohio*, 367 U. S. 643, 646.

> "As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution . . ." *Boyd, supra* at 634.

Finally, in rejecting a distinction that a forfeiture proceeding lies *in rem* against the goods rather than *in personam* against the claimant, it was said:

> "But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited; and to require such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself." *Boyd, supra* at 637.

The *Boyd* case, decided in 1866, survives to this day as unquestionable precedent. *United States v. $5,608.30 in United States Coin and Currency,* 326 F. 2d 359 (7th Cir. 1964); *Berkowitz v. United States,* No. 6411, C. C. A. 1, January 6, 1965, at page 5. It would be presumptuous for this writer to attempt to improve upon the passages quoted above, which so eloquently pierce the argument that evidence obtained in violation of the Fourth Amendment is admissible in a forfeiture proceeding due to its civil form. Suffice it to say that the substantial, if not the only, purpose in confiscating an automobile used to violate the liquor laws of Pennsylvania is that of punishment to the law violator. Certainly the state has no interest in removing

the particular automobile from society.[8] This becomes quite clear in the light of the Pennsylvania Liquor Code's provision for *mandatory* forfeiture of liquor, stills, equipment, material and utensils unlawfully possessed or used, as compared with *discretionary* forfeiture of vehicles unlawfully possessed or used.[9] See *Commonwealth v. One 1959 Chevrolet Impala Coupe*, 201 Pa. Super. Ct. 145, 147-48. In this connection the following language of the Pennsylvania Superior Court is particularly enlightening:

> "It seemed to the court below that to make this man pay the sum of $500.00 in fines, together with the costs of the proceeding and the storage cost for the automobile, was *sufficient punishment* under all the circumstances. To forfeit a 1959 Chevrolet Impala coupe in addition to the above seemed to the court below to be entirely out of proportion to the crime involved. We cannot say that the court below abused its discretion in so acting." *Commonwealth v. One 1959 Chevrolet Impala Coupe*, 201 Pa. Super. Ct. 145, 150. (Emphasis added.)

B. *The Reasons Supporting the Exclusionary Rule in Criminal Cases Are Equally Applicable to Forfeiture Proceedings.*

Lurking in the federal circuits is an apparent confusion as to the general impact of the Fourth Amendment in forfeiture cases.[10] This confusion has been created by the failure of some courts to recognize that two separate and distinct issues have been raised when illegally seized property

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8. In federal forfeiture cases, Congress has provided that *innocent* parties, such as lienholders, may have a forfeited automobile returned to them. Act of June 25, 1948, 62 Stat. 840, 18 U.S.C. 3617.

9. Act of April 12, 1951, P. L. 90, art. VI, § 602, as amended, Pa. Stat. Ann. tit. 47, § 6-602(e) (supp.) (Reproduced above under "Constitutional and Statutory Provisions Involved").

10. See *United States v. One 1963 Cadillac Hardtop*, 220 F. Supp. 841, 842 (E. D. Wisc. 1963); *Cleary v. Bolger*, 371 U. S. 392, 403 (Concurring opinion).

is sought to be forfeited. One issue is whether the illegal seizure of the *res* ousts the court of jurisdiction to enter a decree of forfeiture. The other issue is whether the evidentiary fruits of a Fourth Amendment violation are admissible to prove that the property has been illegally used or possessed and is thus subject to forfeiture under the applicable statute.[11] It is only the latter issue that is presented in the instant case. Just as a lawful arrest is not essential to a court's jurisdiction over a criminal defendant,[12] neither is a legal seizure essential to a court's jurisdiction over the *res* in a forfeiture case.[13] But, just as evidence obtained as the result of an illegal arrest, search and seizure is inadmissible to prove that a criminal defendant is guilty and subject to pronouncement of sentence,[14] so too should such tainted evidence be inadmissible to prove that a man's property has been used in a forbidden manner and is thus subject to a decree of forfeiture.

The various reasons stated by this Court in support of the Fourth Amendment exclusionary rule in criminal cases are equally applicable to proceedings to forfeit a man's property. If a man's house is truly his castle and is not to be invaded by the government even for the praiseworthy purpose of bringing the guilty to punishment,[15] does that castle suddenly become a grass hut, pervious to intrusion, simply because the government wishes to prove that a man's property is subject to forfeiture? The rights of privacy and personal security against arbitrary police in-

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11. This latent confusion is brought to the surface in *United States v. $5,608.30 in United States Coin and Currency*, 326 F. 2d 359 (7th Cir. 1964), wherein the court noted that while the District Court in a forfeiture action has jurisdiction over an illegally seized *res*, it must nevertheless rule on a motion to suppress. *$5,608.30* at 361, 362.

12. *Frisbie v. Collins*, 342 U. S. 519.

13. *Dodge v. United States*, 272 U. S. 530, 532.

14. *Weeks v. United States*, 232 U. S. 383; *Mapp v. Ohio*, 367 U. S. 643; *Wong Sun v. United States*, 371 U. S. 471, 485.

15. *Weeks v. United States*, 232 U. S. 383, 390, 393.

trusion—which the Fourth Amendment protects and guarantees—are fundamental rights, considered by this Court as implicit in the concept of ordered liberty. *Wolf v. Colorado*, 338 U. S. 25, 27-28. Are these guarantees conditioned on the form of action the government has in mind when it chooses to invade a man's privacy? To hold these rights so conditioned would be to establish a gross anomaly in the law. In *Elkins v. United States*, 364 U. S. 206, this Court emphasized the importance of looking to the *effect* of Fourth Amendment violations when it observed that "to the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer."[16] Quite similarly, it matters not to the victim whether his constitutional right has been invaded for indictment purposes or for libel for forfeiture purposes.

A major purpose of the exclusionary rule is to "compel respect for the [Fourth Amendment] guaranty in the only effectively available way—by removing the incentive to disregard it."[17] Is such respect engendered if police officials may have carte blanche authority to stop and search automobiles entering a state to ascertain if they are perhaps subject to forfeiture? Another purpose underlying the exclusionary rule is to avoid the ramifications of the government's committing crimes in order to secure the conviction of a criminal. Mr. Justice Brandeis said that even those ends do not justify the means.[18] *A fortiori*, the ends of a decree of forfeiture of an automobile do not justify such means. And is the court any less of an accomplice in the willful disobedience of the law when if permits tainted evidence to come before it in a forfeiture case than it would be sitting on the criminal side?[19] The answer is clearly no.

This Court said in *Mapp v. Ohio*, 367 U. S. 643, 655, that if the exclusionary rule was not a sanction which states

16. *Elkins v. United States*, 364 U. S. 206, 215.

17. *Id.* at 217.

18. *Olmstead v. United States*, 277 U. S. 438, 485 (Dissenting opinion).

19. *Cf. McNabb v. United States*, 318 U. S. 332, 345.

must impose to enforce the Fourth Amendment, then the Amendment would become a mere form of words not worthy to be considered "implicit in the concept of ordered liberty." It is both logical and correct in principle that the philosophy of *Mapp v. Ohio* be applied to cases of the type at bar. Otherwise, the asymmetry in the law which *Mapp* was supposed to put to an end[20] will once again appear. Moreover, if *Mapp* is not extended to the forfeiture situation, it cannot remain at its present weight and significance in American constitutional law—it can only retreat. This is because law enforcement officers would then feel free to completely disregard the Fourth Amendment under the guise that they are searching with their civil hats on rather than their criminal hats. Thus, the police actions which this Court in *Mapp* deemed "highhanded"[21] and "roughshod"[22] could be repeated by a police announcement at Miss Mapp's door that they are not there to arrest her, but only to forfeit any obscene books she may have.

*Mapp v. Ohio* promised that it would

> "close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right [of privacy], reserved to all persons as a specific guarantee against that very same lawless conduct." *Mapp, supra* at 654-655.

We urge that that last door be kept secure, rather than be partially jimmied to gain entrance to the court of forfeiture.

### C. *An Illegal Seizure Does Not Become Legal by Government Ratification.*

We must consider certain language in some of the opinions of this Court which has led lower courts, including the court below (R. 31-32), to abandon the exclusionary

20. See concurring opinion of Mr. Justice Douglass in *Mapp v. Ohio*, 367 U. S. 643, 670.

21. *Mapp v. Ohio, supra* at 644.

22. *Id.* at 645.

rule in forfeiture cases.[23] In *United States v. One Ford Coupe*, 272 U. S. 321, it was held that the validity of a seizure for forfeiture purposes was not impaired although the seizure was made by the wrong official; *viz.*, the prohibition director rather than an internal revenue officer. The Court's theory was as follows:

> "It is settled that where property declared by a federal statute to be forfeited because used in violation of federal laws is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized." 272 U. S. at 325.

It is the above-quoted language which some courts have taken as a message from this Court that the exclusionary rule is inapplicable in forfeiture cases. Of course, the *One Ford* Court was in no way concerned with the effect on a forfeiture proceeding of an alleged Fourth Amendment violation. Likewise, *Dodge v. United States*, 272 U. S. 530, 532, cited by the court below (R. 32), was merely concerned with the effect of a seizure of liquor made by a municipal police officer rather than the officers designated by the National Prohibition Act. Petitioner submits that the wrong person making an otherwise reasonable search and seizure is constitutionally innocuous compared with the horrors of a search and seizure without probable cause. In the *Dodge* case itself, Mr. Justice Holmes recognized the clear distinction between the wrong officer situation and the unreasonable search and seizure situation. He reasoned that in the former situation the owner of the property suffers nothing that he would not have suffered had the authorized agent made the seizure, whereas "if the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used." *Dodge, supra* at 532.

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23. *E.g., United States v. Carey*, 272 F. 2d 492 (5th Cir. 1959).

The *One Ford* and *Dodge* cases were explained and limited to their own facts in *Cook v. United States*, 288 U. S. 102. In *Cook*, a British ship was seized by the United States and forfeited, contrary to the provisions of a treaty between the two countries. The United States Government contended that the illegality of the seizure was immaterial, citing the ratification doctrine of forfeiture cases as announced in the *Dodge* case. The Court said, in limiting *Dodge*:

> "The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked the *power* to seize." *Cook, supra* at 121.

Similarly, the government has no *power* to seize except in a manner permitted by the Fourth Amendment as interpreted by this Court. Moreover, it is submitted that the language in *One Ford* and *Dodge* cannot be extended to the illegal search and seizure situation when read in the light of this Court's subsequent decision in *Elkins v. United States*, 364 U. S. 206, which, in a word, applied the exclusionary rule to the "silver platter" device.

D. *Property Which Is Derivatively Contraband, as Opposed to Being Contraband Per Se, Must Be Returned to Its Owner if Its Illegal Use Can Only Be Proved by Use of Evidence Obtained as a Result of an Unreasonable Search and Seizure.*

Superficially troublesome is the language of this Court in *United States v. Jeffers*, 342 U. S. 48, and *Trupiano v. United States*, 334 U. S. 699, which led the Third Circuit Court of Appeals to announce the following dictum:[24]

> "The sum of Jeffers and Trupiano is that the body of law relating to unlawful searches, arrests and seiz-

24. Converted into a holding by the court below (R. 32-33).

ures in criminal proceedings is without impact in a libel for forfeiture action which is an *in rem* proceeding." *United States v. $1,058.00 in United States Currency*, 323 F. 2d 211, 213 (3rd Cir. 1963).

*Jeffers* and *Trupiano* were not forfeiture cases, but did mention, in passing, that although the property respectively involved was suppressible as evidence in a criminal case it could not be returned to the defendant since it was contraband. *Jeffers, supra* at 54; *Trupiano, supra* at 710. However, it is important to recall that the property involved in *Jeffers* was narcotics and the property involved in *Trupiano* was "a still, alcohol, mash and other equipment." *Trupiano, supra* at 703. If the narcotics were returned to the possession of Jeffers, he would then be committing the very crimes for which he had been convicted, for Section 2553(a) of the Internal Revenue Code of 1939 made possession of unstamped drugs prima facie evidence of crime and the Narcotic Drug Import and Export Act [25] deemed possession of a narcotic drug sufficient evidence to authorize conviction unless the defendant satisfactorily explained his possession. Similarly, if the still, alcohol and mash were returned to the possession of Trupiano, he would then be committing some of the very crimes with which he was charged,[26] for section 2803(a) of the Internal Revenue Code of 1939 made possession of unstamped distilled spirits a crime and section 2810(a) of the same Code made possession of an unregistered still or distilling apparatus a crime. It is thus apparent that the nature of the property involved in *Jeffers* and *Trupiano* was such that it could have no legitimate existence in the hands of the person seeking return thereof. On the other hand, mere possession of an automobile which

25. 42 Stat. 596, 21 U. S. C. 174.

26. The crimes charged against Trupiano are not enunciated in this Court's opinion nor in the opinions of the courts below. 163 F. 2d 828; 70 F. Supp. 764. Counsel for petitioner ascertained the charges from the complaint filed against Trupiano, reproduced in his Petition for Certiorari at page 3 thereof.

has been used to transport illicit liquor is not of itself a criminal offense. If the automobile in question in the instant case were to be returned to McGonigle, his possession of that automobile would not be a crime or give rise to any statutory presumption of criminal activity. One might say that the type of property involved in *Jeffers* and *Trupiano* is "contraband *per se*", whereas an automobile is only "derivatively contraband" upon proof of its illegal use.

In *Carroll v. United States*, 267 U. S. 132, 156, a case involving the stopping of a car containing illicit liquor, the Court very clearly said that if the car was stopped without probable cause, the owner would have a right to its return. Much more recently, in *Berkowitz v. United States*, No. 6411, C. C. A. 1, January 6, 1965, the First Circuit Court of Appeals indicated that the restoration of illegally seized property depends on the nature of the property involved. *Berkowitz* reversed a decree of forfeiture of currency used in violating the federal revenue laws because the currency was seized in violation of the claimant's Fourth Amendment rights. The court noted, however, citing *United States v. Jeffers*, 342 U. S. 48, 54, that a violation of the Fourth Amendment "should not prevent forfeiture of property the possession of which is *per se* contrary to public policy, as, for example, counterfeiting plates, or narcotics." *Berkowitz, supra* at 13.

This type of analysis provides an explanation to this Court's dictum in *Jeffers* and *Trupiano* now under inspection. It is submitted that this Court did not intend to establish a general rule that all property which is subject to suppression as evidence in a criminal case, but which also has been labeled as contraband by statute, may not be returned to its owner. It is more than likely that it was revolting and intolerable to this Court, as it would be to all men, to hand out narcotics and stills on a silver platter. Indeed, the *Jeffers* Court was well aware of a congressional policy to "prevent the spread of the traffic in drugs."[27]

27. *Jeffers, supra* at 54.

Petitioner is aware of no such legislative policy with respect to automobiles, a commodity which is readily available by the mere signing of a credit application.

Once one concludes that this Court's language in *Jeffers* and *Trupiano* was not meant to prohibit the return of all articles labeled "contraband", without regard to their inherent nature, the problem remains as to just what may be returned following a successful motion to suppress, or just what may be forfeited to the government irrespective of the method by which it obtains possession. In the forfeiture situation, one side of the spectrum would include property which is *per se* offensive and subject to destruction. The clearest example of an item to be relegated to this infamous category would be a counterfeiting plate, which can only be "up to no good". Less clear, but still considered "*per se* contrary to public policy" in *Berkowitz v. United States, supra,* would be narcotics, which are hardly ever "up to any good."[28] As suggested by the above analysis of the *Jeffers* and *Trupiano* cases, any property which it is a crime to possess, such as a machine gun in Pennsylvania,[29] could be considered *per se* offense, as well as property the possession of which raises the presumption of the commission of crime, such as the still involved in *Trupiano*.[30] On the other side of the spectrum would be items which are by common experience intrinsically unoffending, and which can only be proven "guilty" by extrinsic evidence. Obvious candidates for this category

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28. In *Yee Hem v. United States,* 268 U. S. 178, 184, this Court noted that legitimate possession of opium is "highly improbable".

29. Act of June 24, 1939, P. L. 872 § 629, Pa. Stat. Ann. tit. 18, § 4629.

30. Of course inclusion of articles in the *per se* category by virtue of being a crime to possess or by virtue of their possession raising a presumption of crime would be subject to the qualification that the statute causing such result be within the police power of the legislature. As to obscene books, for example, see *Smith v. California,* 361 U. S. 147.

are currency, which was permitted to be returned to its owner in *Berkowitz v. United States, supra,* and automobiles, which, we urge, should be permitted to be returned to the owner in the instant case. It is certainly no more repugnant to public policy to return articles of this nature to their owner if the extrinsic proof of their guilt has been illegally obtained by the government than it is to set criminals free because the "constable has blundered."[31]

## CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed with directions that the Order of the Court of Quarter Sessions of Philadelphia County dismissing the Commonwealth's Petition for Forfeiture be reinstated.

Respectfully submitted,

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31. *Cf. People v. Defore,* 242 N. Y. 13, 21, 150 N. E. 585 (1926).